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In the

Supreme Court of the United States

PHILADELPHIA NEWSPAPERS, INC.:
Petitioner,
v.
NEW JERSEY AND FRED NEULANDER,
Respondents.

On Petition for a Writ of Certiorari to The Supreme Court of New Jersey

BRIEF *AMICI CURIAE* OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, AMERICAN SOCIETY OF NEWSPAPER EDITORS, CBS BROADCASTING INC., COURTROOM TELEVISION NETWORK LLC, GANNETT CO., INC., NATIONAL BROADCASTING COMPANY, INC., THE NEW JERSEY PRESS ASSOCIATION, THE NEW YORK TIMES COMPANY, THE NEWSPAPER ASSOCIATION OF AMERICA, THE RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION, THE SOCIETY OF PROFESSIONAL JOURNALISTS, THE WASHINGTON POST COMPANY, IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

The American Society of Newspaper Editors is a professional organization of more than 800 persons who hold positions as directing editors of daily newspapers in the United States and Canada. The purposes of the Society include assisting journalists and providing an unfettered and effective press in the service of the American people.

CBS Broadcasting Inc. produces and broadcasts news, public affairs, and entertainment programming. CBS News produces morning, evening, and weekend news programming, as well as news and public affairs magazine shows, such as 60 MINUTES and 48 HOURS. CBS owns and operates broadcast television stations nationwide and, through a related company, Infinity Broadcasting Corporation, owns and operates radio stations throughout the country.

Courtroom Television Network LLC ("Court TV"), a basic cable network, provides a window on the American system of justice through distinctive programming that informs and entertains. Court TV is 50% owned by AOL Time Warner, and 50% owned by Liberty Media Corp. The network reaches more than 75 million homes.

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[1] Pursuant to SUP. CT. R. 37.6, counsel declares that *amici curiae* authored this brief in whole. Additionally, no individuals or organizations other than the *amici* made a monetary contribution to the preparation and submission of this brief. Written consent of all parties to the filing of the brief has been filed with the Clerk pursuant to SUP. CT. R. 37.3(a).

Gannett Co., Inc. is an international news and information company that publishes 94 daily newspapers in the US with a combined daily paid circulation of 7.7 mllion, including USA TODAY, which has a circulation of 2.3 million. Gannett publishes a variety of non-daily publications, including USA WEEKEND, a weekly newspaper magazine with a circulation of 23.6 million. The company also operates more than a 100 web sites and a national news service. Gannett's 22 TV stations cover 17.7 percent of the US.

National Broadcasting Company, Inc. ("NBC") is a diversified media company that produces and distributes news, entertainment and sports programming via broadcast television, cable television, the Internet and other distribution channels. The NBC News division provides news and public affairs programming to more than 200 affiliated television stations across the country, including 14 stations that are owned and operated by NBC and that also separately produce and broadcast local news and public affairs programs. NBC also owns and operates the Telemundo Spanish-language television network and station group, the cable business news network CNBC, and MSNBC, a 24-hour cable news network that is jointly owned with Microsoft.

The New Jersey Press Association ("NJPA") is a not-for-profit organization of daily, weekly, and college newspapers published in New Jersey as well as corporate and associate members whose mission is to help member newspapers remain editorially strong, financially sound and free of outside influence.

The New York Times Company publishes The New York Times, a daily newspaper with a national circulation of 1.1 million daily and more than 1.7 million on Sunday. The company also owns The Boston Globe, The International Herald Tribune, as well as 16 regional newspapers and eight television stations.

The Newspaper Association of America ("NAA") is a nonprofit organization representing the interests of more than 2,000 newspapers in the United States and Canada. NAA members account for nearly 90 percent of the daily newspaper circulation in the United States and a wide range of non-daily newspapers. One of NAA's key strategic priorities is to advance newspapers' First Amendment interests, including the ability to gather and report the news.

The Radio-Television News Directors Association is the world's largest professional organization devoted exclusively to electronic journalism. Formed in 1946, RTNDA's membership encompasses more than 3000 news directors, news associates, educators, and students in more than 30 countries. From its inception, RTNDA has encouraged excellence in electronic journalism.

The Society of Professional Journalists is a voluntary nonprofit journalism organization representing every branch and rank of print and broadcast journalism. SPJ is the largest membership organization for journalists in the world, and for more than 90 years, SPJ has been dedicated to encouraging a climate in which journalism can be practiced freely, fully, and in the public interest.

The Washington Post Company publishes The Washington Post, with a daily circulation of over 782,000 and a Sunday circulation of over 1.06 million.

SUMMARY OF ARGUMENT

The New Jersey Supreme Court's order in this case severely restricts the First Amendment rights of the press and limits the exchange of information about the administration of justice in our society. The order upholding a prior restraint on the media is part of an alarming trend by courts toward blocking journalists from talking to jurors.

The public and the press rely on interviews of discharged jurors to explain the outcome of a particular trial, the experience of serving on a jury, and the operation of the judicial system. Such stories often lead to exposure of misconduct or abuse. All of this information comes from the unique perspective of a juror and cannot be obtained directly from other sources.

While there is no requirement that jurors must reveal their thoughts and impressions about a trial to the public, they certainly should not be barred from doing so if they wish to speak to the press. Nor should any member of the public — whether a member of the press or an ordinary citizen — be barred from merely asking.

The court order at issue is unprecedented. The New Jersey Supreme Court's order not only barred the media from contacting jurors, but also prevented jurors who wanted to speak from contacting the press. Such an order is an unconstitutional prior restraint warranting review by this Court.

ARGUMENT

I. THE COURT ORDER PROHIBITING JUROR INTERVIEWS BY MEDIA REPRESENTATIVES SHOWS A DISTURBING TREND OF UNCONSTITUTIONAL PRIOR RESTRAINT OF THE PRESS IN CASES OF GREAT PUBLIC INTEREST.

As this Court has recognized before, "prior restraints on speech and publication are the most serious and least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). Because a prior restraint order has the effect of not only chilling, but freezing speech, a heavy presumption exists against its use. *Id.* at 558-59; *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963).

The New Jersey Supreme Court order is a prior restraint that strikes at the heart of the First Amendment. The court's sweeping order prevents the media from interviewing all discharged jurors on any topic, even if an individual juror wants to speak with the press. Without the ability to gather information, the press is effectively censored.

Were this case anomalous, it would not be so alarming. Unfortunately, courts throughout the country have been chipping away at the public's ability to learn what is happening in its criminal justice system by issuing orders that prevent journalists from interviewing — or even identifying — discharged jurors. *Amici Curiae* are in a unique position to monitor this disturbing trend and strongly urge the Court to address it.

Many of these restraints on access to jurors come in those cases in which the public has the most interest. For example, in a products liability case against Bridgestone/Firestone, Inc. for defective tires, a district court judge prohibited journalists from contacting jurors without submitting a written application and receiving specific approval from the court. The judge issued the order to prevent juror harassment. *See* Bob Van

Voris, *5th Circuit OKs Shielding Jurors*, NAT'L LAW JOURNAL, Oct. 15, 2001, at A4. Jury deliberations were underway in the case when the parties settled, thus avoiding a verdict. *Id.* According to the National Highway Traffic Safety Administration, Firestone tires were linked to more than 192 deaths and 500 injuries as of September 2001. *See Engineering Analysis Report and Initial Decision Regarding EA00-023: Firestone Wilderness AT Tires*, U.S. Dep't of Transportation, Nat'l Highway Traffic Safety Admin., Office of Defects Investigation, October 2001. While hundreds of lawsuits had been filed over the defect, none had gone to trial. *See* Joyzelle Davis, Bloomberg News, *Jury Told Ford, Firestone Hid Flaws*, WASHINGTON POST, Sept. 12, 2002, at E3. Because these prior defect cases avoided trial through secret settlements, the public's interest in how this trial had proceeded and concern over tire safety issues was particularly great. However, the court's decision choked off a critical source of information from the discharged jurors who served.

In another instance, when jurors in Oakland, California awarded two environmentalists $4.4 million, the district court judge prohibited jurors from discussing the case with anyone other than family members until after the appellate process ends, which could take years. *See* Harriet Chiang, SAN FRANCISCO CHRONICLE, *Interviewing Jurors After Trials*, June 16, 2002, at A7, *available at* 2002 WL 4023070. Jurors found that the FBI and Oakland Police Department violated the constitutional rights of two environmental activists who were injured in a 1990 car-bomb blast by focusing on them as suspects and conducting illegal searches and seizures. *Bari v. United States*, Case No. 91-CV-1057 (N.D. Cal. June 11, 2002). While the court later vacated its order, the public was denied access to valuable information regarding the actions of public officials. *Id.*

In Texas, a judge overseeing the 2001 trial of Andrea Pia Yates, a mother who drowned her five children in a bathtub,

entered an order barring the news media from interviewing jurors in Yates's competency hearing or publishing any information about them. *See* Lisa Teachey, *Judge in Yates Trial is Asked to Allow Media Access to Jurors*, HOUSTON CHRONICLE, Oct. 4, 2001, at 28, *available at* 2001 WL 23633836. The issue before the court was of critical public importance: how does the judicial system decide whether an individual who admits to a heinous act is competent to stand trial for that crime? The order, initially barring all contact indefinitely, was later modified to limit contact with the jurors in the competency hearing until the conclusion of a subsequent criminal trial. *Id.* Nonetheless, the public was denied access to important information on how the courts handle insanity issues while the issue was the subject of nationwide debate and media attention.

In this case, the court order preventing journalists from talking to jurors is not only unconstitutional, but ludicrous in practice. Jurors are able to discuss cases with friends, neighbors, academics, criminal justice organizations, and even strangers — anyone but the media. This forces journalists to obtain this information indirectly by contacting third parties who have talked with jurors. Misinformation becomes more likely since the media are unable to receive first-hand information provided by jurors.

Even if jurors want to talk directly to the press and wish to initiate such contact, such action is prohibited. Yet these restraints on speech do not prevent jurors themselves from publishing information about their jury experience in books, articles or over the Internet. Such a result that targets and effectively censors the media is inconceivable in a democratic society. Indeed, "[o]ur liberty depends on the freedom of the press, and that cannot be limited without being lost . . . ." *Nebraska Press*, 427 U.S. at 548 (quoting 9 Papers of Thomas Jefferson 239 (J. Boyd ed. 1943)).

In light of the "immediate and irreversible sanction" of a

prior restraint order, review of this case is needed to prevent the inevitable chilling effect on speech. *Nebraska Press*, 427 U.S. at 559. Without review, an order such as this one places a journalist in an impossible position — facing either censorship or contempt charges. Even if orders limiting contact with discharged jurors are later found to be unconstitutional after a media challenge, journalists who interview jurors risk sanctions, including fines and jail time.

As numerous news organizations unfortunately have discovered, the First Amendment cannot always be used as a shield against an unconstitutional order restraining speech. It is important that this Court accept review so that future journalists are not sanctioned for exercising rights guaranteed by the First Amendment.

II. BANNING INTERVIEWS OF JURORS AND POTENTIAL JURORS PREVENTS NEWSGATHERING AND IS CONTRARY TO THE FIRST AMENDMENT RIGHT TO OPEN CRIMINAL TRIALS AND THE PUBLIC'S RIGHT TO RECEIVE INFORMATION.

A. This Court has recognized the public's interest in knowing how justice is administered, particularly in criminal trials.

Open judicial proceedings are fundamental to our legal system and our liberty. As a matter of constitutional, statutory and common law, courts have consistently held that judicial proceedings must be conducted in public.

In *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), the U.S. Supreme Court established beyond a doubt that the public and the press have a First Amendment right to open criminal trials. The Court stated that "a presumption of openness inheres in the very nature of a criminal trial under our system of justice." *Id.* at 573. Through open judicial

proceedings the press is able to provide public education and scrutiny of the judicial process.

> "A responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field. Its function in this regard is documented by an impressive record of service over several centuries. The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism."

Nebraska Press, 427 U.S. at 559-60 (1976) (quoting *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966)).

Such openness must apply to all aspects of the trial, including access to jurors once they have been discharged. As the exclusive triers of fact, jurors are a crucial component of a criminal trial, vested with the authority to determine the guilt or innocence of the accused.

As such, the public has an interest in knowing about the jurors who serve as representatives of their community. "It is important for the public to receive information about the operation of the administration of justice, including information about the people who do render justice in the truest sense of the word." *United States v. Doherty*, 675 F.Supp. 719, 723 (D. Mass. 1987) (holding that under the First Amendment, jurors' names and address must be made public). By interviewing jurors following a trial, the press is able to discover and inform the public about the make-up of the jury. The district court order in this case is particularly troublesome because The Philadelphia Inquirer was investigating whether the jury forewoman was a Pennsylvania resident and should be sitting on the jury panel. The order prohibited the reporters from asking the juror to respond to this question after the first

trial had ended. Instead, the public is left questioning whether the jury was properly empaneled.

Jurors may want to speak with the press to respond to allegations of misconduct or public criticism of their verdict. As representatives of their communities, jurors have a right to speak freely with the press to inform the public of their thoughts regarding the trial for which they served. "'Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press. . . .'" *Near v. Minnesota*, 283 U.S. 697, 713-14 (1931) (internal citation ommitted). Permitting all other members of the public to speak with the press, but denying this same right to members of the jury, prevents the public from better understanding the judicial process through the experience of the actual jurors who rendered the verdict.

Banning interviews of jurors also deprives the public of information that may be cathartic for a community devastated by a crime. "When a shocking crime occurs, a community reaction of outrage and public protest often follows. (citation omitted). Thereafter the open processes of justice serve an important prophylactic purpose, providing an outlet for community concern, hostility, and emotion." *Richmond Newspapers*, 448 U.S. at 571. Juror interviews help the public better understand the outcome of a trial and provide "therapeutic value" to a community impacted by a criminal act. *Id.* at 570.

As this Court has recognized, "[t]he operation of the . . . judicial system itself . . . is a matter of public interest, necessarily engaging the attention of the news media." *Landmark Communications v. Virginia*, 435 U.S. 829, 839 (1978). Through juror interviews, the public can examine how the judicial system operates and how justice was administered by the jury. In this case, juror interviews could have helped establish that the judicial process was functioning properly in spite of the inconclusive verdict. In order for the judicial

system to keep the public's trust and maintain "confidence that standards of fairness are being observed," it is imperative that the public be able to obtain information from jurors about the trial and scrutinize its processes. *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 509 (1984).

In this sense, the timing of juror interviews is critical. In the instant case, the court's order effectively prohibited jurors from the first trial from speaking with the press for an entire year. This prior restraint of speech and "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *see also CBS Inc. v. Davis*, 510 U.S. 1315 (1994). While the court's order is not indefinite and prohibited interviews of discharged jurors from the first trial until after "conclusion of the retrial and return of the verdict," this is precisely the interval in which any possible misconduct should be brought to light. Pet. App. 2a. If the public is to have any faith in the administration of justice during the second trial, it needs to have confidence that if misconduct in the first trial occurred, it was exposed and resolved. "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." *Richmond Newspapers*, 448 U.S. at 572.

B. Journalists use juror interviews to expose misconduct, educate the public, and serve as a check on the judicial process.

Under normal circumstances, a journalist is able to approach any person to ask about a matter of public concern. That person is free to speak or not speak to the reporter. Journalists rely on this same type of interaction with discharged jurors to provide the public with valuable information regarding the judicial system. To order journalists to refrain

from contacting discharged jurors destroys a critical newsgathering avenue.

The importance of juror interviews cannot be ignored. The most recent example of how juror interviews benefit the public can be found on the front page of the Jan. 5, 2003 issue of The New York Times. *See* Benjamin Weiser, A *Jury Torn and Fearful in 2001 Terrorism Trial*, N.Y. TIMES, Jan. 5, 2003, at A1. In this article, correspondent Benjamin Weiser used extensive juror interviews to report on the trial of four men who were convicted of conspiring with Osama bin Laden in the 1998 bombings of two American Embassies in East Africa. While the jury convicted these men of conspiracy, there were not enough juror votes to impose the death penalty.

By using juror interviews, the reporter provided the public with an understanding of what it was like to serve on a high-profile death penalty case of national importance. The article not only described the make-up of the jury, but the conditions under which the jurors worked. It also described the jury questionnaire used in a death penalty case, how each juror ranked the strength of their position regarding the death penalty on a 1 to 10 scale, and how each juror ultimately voted.

Interviews with jurors also demonstrated how they responded to making such an important decision regarding the execution of four convicted terrorists. Two jurors consulted pastors, in violation of the judge's directive not to seek outside advice. Another juror described how he feared retaliation by Islamic terrorists. And yet another juror explained how the court was confused over his position on the death penalty during jury selection. During these interviews, jurors were able to reflect on their decisions. The most vocal juror in favor of executing the defendants explained that in hindsight she was glad the jury did not vote in favor of the death penalty since the September 11 attacks may have been viewed as retaliation for their decision.

In addition to The New York Times, media organizations across the country rely on juror interviews to provide the public with valuable information retarding the administration of justice. For example:

- In Alabama, The Mobile Register relied on juror interviews to help explain the reason why a federal jury in a racketeering case against former police officers failed to reach a verdict. The article quotes one juror as saying at least two other panel members "had their minds made up" and were determined to acquit the defendants. While jurors favoring acquitting the police officers believed prosecutors failed to meet their burden of proof. Another juror described his frustration over the "reasonable doubt" instruction given to the jury. "I wish they had never written that in there," said the juror who favored convicting the defendants. *See* Joe Danborn, *Jurors: Holdouts Never Budged*, MOBILE REGISTER, Nov. 1, 2001, at A4.

- In Pennsylvania, The Philadelphia Inquirer described numerous conversations and contacts between jurors and associates of the defendants in a case charging six former narcotics officers of corruption. According to one juror, conversations between jurors and defendants and their family members in the federal building cafeteria were thought to be permissible because so many court employees were present. Other jurors commented that better efforts should have been made to separate the jurors from the six defendants and their numerous family members. "I think they really should have stressed to us, 'Don't ever look at them' . . . it was impossible to avoid anyone," said one juror. In spite of the contacts, two of the three jurors who voted against conviction said that these contacts did not influence their votes. *See* Emilie Lounsberry, *Five Squad Jurors Tell of Contacts During Deliberations*, PHILADELPHIA INQUIRER, Mar. 26, 1989, at A1; *see also* Daniel R. Biddle and Emilie Lounsberry, Five Squad

Jurors Seen Talking to Defendants, PHILADELPHIA INQUIRER, Mar. 9, 1989, at A1.

- In Louisiana, The Baton Rouge Advocate gained insight into why a jury awarded one million dollars to two retired police officers who filed complaints against the Baton Rouge Police Department for racial discrimination and harassment. According to one juror, the fact that two former police supervisors accused of using racial slurs and the police chief did not testify "was crucial to the jury's decision." *See* Michelle Millhollon, *Jury Finds for Retired Officers*, BATON ROUGE ADVOCATE, Jan. 15, 2002, at A1.

- In New York, Newsday interviewed jurors who responded to criticism by a defense attorney who said the jury was distracted by the defendant's Nazi tattoos. Instead, jurors "pointedly ignored the tattoos during deliberations" and focused on the weapon used to attack two Mexican laborers. *See* Andrew Smith, *Guilty of All Counts in Worker Beatings*, NEWSDAY, Aug. 17, 2001, at A5. In another case, Newsday interviewed jurors who explained the difficulty of imposing the death sentence in a case involving the brutal rape and death of a woman. "It was the most difficult decision we'll ever have to make. . . . It will live in our minds for years," said one juror. *See* Andrew Smith, *Jury Rules: It's Death*, NEWSDAY, Aug. 17, 2000, at A7.

An order preventing juror interviews would have prevented these articles from being written or published. If the Court does not accept review of this decision, it is likely that other judges will prohibit journalists from contacting discharged jurors. Such orders will prevent perhaps the most enlightening perspectives during a trial from being shared with the public. This effective censorship of both jurors and the press should not go unredressed. Indeed, "without some protection for seeking out the news, freedom of the press

could be eviscerated." *Richmond Newspapers*, 448 U.S. at 576 (quoting *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972)).

CONCLUSION

The order prohibiting media representatives from interviewing jurors, even when jurors initiate contact with the press, strikes directly at the protections provided by the First Amendment. Granting review of this order is necessary to provide clear guidance to courts regarding this important question of constitutional law. Accordingly, the petition for writ of certiorari filed by Philadelphia Newspapers, Inc. should be granted.

Respectfully submitted,

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